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No. 216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Real Estate Corporation, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 1, 1962.

OPINIONS BELOW.

The opinion of the Tax Court is reported at 35 T.C. 610; and it and the judgment based thereon are reproduced at pages 45-57 inclusive of the transcript of the

record filed in the Court of Appeals for the Tenth Circuit, nine copies of which have been filed with the clerk under the provisions of this Court's Rule 21, paragraph 4.

The opinion of the Court of Appeals for the Tenth Circuit is reported at 301 F.2d 423; and the opinion with post-decision orders on denial of petition for rehearing is printed in the Appendix.

JURISDICTION.

The jurisdiction of this Court is invoked on the following grounds:

(a) The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 1, 1962, affirming the decision of the Tax Court which denied petitioner the relief claimed.

(b) On April 23, 1962, an order was entered by the United States Court of Appeals for the Tenth Circuit denying a petition for rehearing, but "correcting" the original opinion filed March 1, 1962.

(c) 26 U.S.C.A., Sec. 7482(a) (Act of August 16, 1954, c. 736, 68A Stat. 890); and 28 U.S.C.A., Sec. 1254 (Act of June 25, 1948, c. 646, 62 Stat. 928), are the statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED.

As the Tax Court found, petitioner is an investment company formed to hold assets which could not be held by Riverview State Bank, a state banking corporation of Kansas, or its wholly owned subsidiary.

Petitioner did none of the things ordinarily associated with one holding property primarily for sale to customers

such as holding a real estate dealer's or broker's license, or soliciting purchasers; or maintaining an office; or advertising, or listing in the city directory. Petitioner did, under the stress of circumstances and without solicitation by it transfer various pieces of real estate for public purposes; or under threat of condemnation; or because investment value of a piece of property had ceased to exist; and it transferred property to builders and others to alleviate an acute shortage of housing and business locations brought on by the disastrous flood of July 13, 1951. It also bid at tax sales to protect the lien of municipal securities it had acquired at the time it was formed, or to reinvest the proceeds of transferred property.

When all assets acquired by petitioner on its formation were capital assets—do the activities listed above constitute a second business of holding property primarily for sale to customers in the ordinary course of business, thus causing that property to lose its capital asset status so that on gain from these transfers the petitioner should be excluded from and denied the benefit of the capital gains tax under the Internal Revenue Code of 1939, 26 U.S.C., 1952 ed., Sec. 117?

STATUTE INVOLVED.

(26 U.S.C., 1952 ed., Sec. 117, pp. 158, 162)

"Sec. 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) (as amended by Sec. 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906) Capital assets.—The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * *

(j) (as added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of property used in the trade or business.—For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not * * * (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

CONCISE STATEMENT OF THE CASE.

There was no conflict in the evidence; and this was conceded by the respondent on brief in the Court of Appeals at page 8, Note 1.

The Riverview State Bank of Kansas City, Kansas, a state banking corporation, invested in municipal securities of the City of Kansas City, Kansas, called special tax bills. The special tax bills were issued to contractors to pay for public improvements.

Each special tax bill became a lien on a particular lot in a benefit district, payable in not to exceed ten annual installments.* If the general taxes due were not

*General Statutes of Kansas, 1935, Sec. 13-1079, p. 224, in pertinent part provides:

"* * * said governing body shall provide for the payment of the cost thereof by special tax bills against the property charged therewith, payable in not to exceed ten annual installments. * * *"

paid there was a foreclosure of the general tax lien and to protect its investment and the lien of special tax bills the Bank was forced to bid at tax sales. Consequently the Bank acquired real property which it could not hold indefinitely under Kansas law.

When state and federal bank examiners objected to the acquisition of real property by the bank, it transferred the special tax bills and the land to a wholly owned subsidiary General Securities Corporation, Inc. The same objections were made to General Securities Corporation, Inc., so a group of individuals, all but one being stockholders of Riverview State Bank, formed petitioner Real Estate Corporation, Inc., in 1949, as an investment company. Petitioner purchased all the assets including land and special tax bills. (10th Circuit Record, pp. 23, 24, 26, 27 and 28).

The purpose of Real Estate Corporation, Inc., petitioner was to hold the assets for their investment advantages. (Tax Court Opinion, 10th Circuit Record, page 49; 10th Circuit Court of Appeals Opinion, 301 F.2d at p. 426, Appendix p. A3).

From time to time petitioner purchased land at tax sales to protect the lien of special tax bills and thus one capital asset—a special tax bill—was converted into another capital asset, a piece of land.

In the years 1950, 1951 and 1952, petitioner engaged in the transactions shown in the chart printed in the Tax Court opinion (10th Circuit Record at page 47), and in the Court of Appeals opinion. (Appendix at page A2, 301 F.2d at page 425).

On nonconflicting evidence the Tax Court found that petitioner was engaged in the business of holding real estate for investment purposes—but that it was also engaged in the business of holding unimproved land primarily for

sale to customers in the ordinary course of business. (10th Circuit Record, page 50).

On nonconflicting evidence the Tax Court also found that little time was devoted by petitioner to buying and selling real estate, there being no soliciting, advertising or listing and it did not engage in any activities for the purpose of making the land more saleable. (Tax Court Opinion, 10th Circuit Record, page 51).

Many of the transfers of investments in land from petitioner were for public purposes—to the University of Kansas through the K.U. Medical Center; to the city for the pistol range for the Kansas City, Kansas, Police Department; there were condemnations by the City of Kansas City, Kansas; there were transfers to the Kaw Valley Drainage Board for flood protection; transfers to the Kansas Toll Road Authority and to the Kansas Highway Department; to the Kansas City, Kansas, Board of Public Utilities; to the Board of Education; to the Citizens Military Committee for the National Guard Armory; and to the Union Pacific Railroad Company under threat of condemnation. (10th Circuit Record, pages 29 and 30).

The purpose and pattern of the petitioner is aptly epitomized in the following testimony of its President:

> "13. The purpose of Real Estate Corporation is to accumulate income out of the investments it makes (136) (138); to develop rentals and lease rentals for its property as the ordinary income of the corporation —the liquidation of investments is incidental and not a part of the business of the company—when payments are made, the proceeds are invested in other property for the primary purpose of the corporation, that is, the holding of real estate for its investment advantages (26)." (10th Circuit Record, page 24).

> "72. Pattern of the Real Estate Corporation investment was that numerous lots located over the City

of Kansas City, Kansas, were acquired from the General Securities Corporation. A certain amount of those properties developed into revenue producing properties (135). It hasn't been possible to lease every property or improve every piece. The purpose of the corporation is to accumulate income out of the investment which had been made. Not every one turns out profitably—leases made have produced a revenue over the period of ten or eleven years of over 72% of the gross revenue. Real Estate Corporation is not in the real estate business—and never has been—never represented a client as agent—or wrote an insurance policy—or did any of the things a real estate firm does (137). We have invested in real estate—income from leases represents 72.58 per cent of the gross income of the corporation since 1949 (138)." (10th Circuit Record, page 44).

The respondent conceded and the Tax Court found that petitioner was in the business of leasing improved real estate. (10th Circuit Record, page 53) but also held that petitioner was engaged in a second business of holding unimproved land primarily for sale to customers in the ordinary course of business. (10th Circuit Record, pages 50, 54).

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The Court of first instance was the Tax Court and its jurisdiction is conferred by 26 U.S.C.A., Sec. 7442 (c. 736, 68A Stat. 879); 26 U.S.C.A., Sec. 6213(a) (c. 736, 68A Stat. 771); and 26 U.S.C.A., Sec. 6214 (c. 736, 68A Stat. 773), all in the Act of August 16, 1954.

REASONS FOR GRANTING THIS WRIT.

1. It is important to investors and others to know whether the liquidation of investments under the circumstances of this case deprives them of the benefit of the

capital gains provisions of the Internal Revenue Code, and this question has not been decided by this Court.

2. By basing their decisions primarily on frequency and continuity of transactions, the decisions of the Tax Court and the Court of Appeals for the Tenth Circuit are in conflict with:

(a) The decision of the 5th Circuit Court of Appeals in *Lobello* v. *Dunlap*, 210 F.2d 465, where it was held that frequency and continuity of sales by themselves do not conclusively cause assets to lose their character as capital assets but may be offset by other facts, citing *Victory Housing No. 2* v. *Commissioner of Internal Revenue*, 10th Circuit, 205 F.2d 371.

(b) The decision of the 10th Circuit Court of Appeals in *Victory Housing No. 2* v. *Commissioner of Internal Revenue*, 205 F.2d 371, where it was held:

> "The fact that 42 units were sold over a period of six months does not establish a real estate business or the sale of property in the ordinary course of such a business." (p. 373).

(c) The decision of the 5th Circuit Court of Appeals in *Cole* v. *Usury*, 294 F.2d 426, where it was said:

> "There are many cases where this Court has held the taxpayers entitled to capital gains treatment in which the frequency and continuity of sales were more intense than in the present case; e. g. Goldberg v. Commissioner of Internal Revenue, 5 Cir., 1955, 223 F.2d 709 (90 Houses and lots in one year); Ross v. Commissioner of Internal Revenue, 5 Cir., 1955, 227 F.2d 265 (235 lots in 38 transactions in 2 years); Consolidated Naval Stores v. Fahs, 5 Cir., 1955, 227 F.2d 923 (over 100 sales totaling 200,000 acres in one year)." (p. 429).

For the three years in issue here there were only 52 transactions involving transfers from petitioner and only 18 transactions involving transfers to petitioners. (10th Circuit Court Record, page 47).

(d) The decision of the Ninth Circuit Court of Appeals in *Austin* v. *Commissioner of Internal Revenue*, 263 F.2d 460.

3. The Court of Appeals applied the following erroneous standards for decision:

(a) In ruling that it was bound by findings of the Tax Court which were made on uncontroverted testimony and applying the principle of Rule 52(a) of the Federal Rules of Civil Procedure, because in *U.S.* v. *DuPont De-Nemours & Co.*, (1957) 353 U.S. 586, 1 L. Ed. 2d 1057, this Court said:

> "N. 28. There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52 (a), that findings of fact shall not be set aside unless clearly erroneous." (353 U.S. at page 598).

The DuPont decision was followed by this Court in *U. S.* v. *Mississippi Valley Generating Co.*, (1960) 364 U.S. 520, 5 L. Ed. 2d 268.

(b) In ruling that

> "* * * If the findings of the Tax Court find support in the record, we may not reverse because we, in the first instance, might have reached a different conclusion." (Appendix page A5, 301 F.2d at page 427).

and that

> "We feel that the Tax Court's conclusions that the corporation was engaged in a second business of buy-

ing and selling these vacant lots in the ordinary course of business finds support in the record." (Appendix p. A7, 301 F.2d at page 428).

But in *Cravens* v. *Commissioner of Internal Revenue*, 272 F.2d 895, 898, the 10th Circuit Court of Appeals' opinion reads in part:

> "Here the basic facts are not in controversy * * * A consideration of the nebulous distinctions between findings of fact and conclusions of law is not helpful. There are presented no conflicts of evidence or inference. *We must take the record and determine whether a mistake has been made.*" (Italics ours).

This is in accord with the decision of this Court in *U. S.* v. *U. S. Gypsum Co.*, (1948) 333 U.S. 364, 92 L. Ed. 746, where the following statement appears:

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." (333 U.S. at p. 395).

(c) In ruling that the decisive test was whether petitioner engaged in

> "* * * the purchase and sale of real estate in the ordinary course of business." (Appendix p. A6, 301 F.2d at page 427).

and a

> "* * * second business of buying and selling these vacant lots in the ordinary course of business * * *" (Appendix page A7, 301 F.2d at page 428).

But the statutory test is

> "* * * properly held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *" (26 U.S.C.A., Sec. 117).

The property in question was held—but not for sale—or to customers—or in the ordinary course of petitioner's investment business.

Furthermore, the Court of Appeals has in effect ruled that "primarily" means "ultimately". This makes appropriate the following statement of the 5th Circuit Court of Appeals in *Hillard v. Commissioner of Internal Revenue*, 281 F.2d 279, at page 283:

> "To hold, as we would be required to hold to sustain the Commissioner's position, that 'primarily' means 'ultimately' would be out of keeping with the purpose and intent of the statute."

(d) In ruling that, in the original opinion, with reference to "special tax bills":

> "These were short-term paper and certainly did not constitute capital assets." (Original Opinion, p. 10; Appendix, p. A6).

On petition for rehearing (Certified transcript, p. 5) the Clerk was instructed to strike the statement from the opinion on file. (Certified transcript, p. 6, Appendix, pp. A9, A10).

As pointed out in the petition for rehearing, this statement was inaccurate. (Certified transcript, p. 5; Petition for Rehearing, p. 9).

The Court of Appeals made another erroneous statement in its original opinion—that there had been no single instance of refusal by petitioner to sell. (Original opinion, p. 11, Appendix, p. A7). It also was stricken (Appendix, p. A10).

Acquiescence cannot be given to the Court of Appeals' statement that these inaccuracies were "* * * not necessary to a decision of the case * * *"; or did "* * * not require a different result"; or to the statement that

"A careful reading of the opinion supports this conclusion and makes the philosophy thereof clear and unmistakable * * *". (Certified transcript, p. 6; Appendix, p. A10).

On the contrary, it is respectfully asserted that these statements do require a different result, for they show that the conclusions in the opinion of the 10th Circuit Court of Appeals are based on fallacious premises.

CONCLUSION.

The issue presented here under the circumstances of this case has not been decided by this Court either under the Internal Revenue Code of 1939 or the Internal Revenue Code of 1954.

The importance of the question for decision; the conflict between the decision sought to be reviewed and the decisions of other Courts of Appeal; and the failure of the 10th Circuit Court of Appeals and the Tax Court to follow standards established by this Court have been demonstrated.

Only as recently as April 30, 1962, it was said in the opinion of this Court in *Commissioner of Internal Revenue* v. *Bilder*, (No. 384—October Term, 1961) U.S. , 8 L. Ed. 2d 65,

"* * * Because of a subsequent contrary holding by the Court of Appeals for the Second Circuit * * * and the need for a uniform rule on the point, we granted certiorari to resolve the conflict." (p. 67).

In *Putnam* v. *Commissioner of Internal Revenue*, 352 U.S. 82, 1 L. Ed. 2d 144, is the following ruling of this Court:

"* * * Because of an alleged conflict with decisions of the Courts of Appeals of other circuits, we granted certiorari." (352 U.S., p. 84).

An important question of federal law is involved; and the question has not been but it should be settled by this Court for it will recur not only under the Internal Revenue Code of 1939 but also under the Internal Revenue Code of 1954.

It is therefore very respectfully submitted that the petition for certiorari should be granted.

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OPINION OF TENTH CIRCUIT COURT OF APPEALS.

(March 1, 1962)

N. E. Snyder, for Petitioner.

Thomas H. McPeters (John B. Jones, Jr., Acting Attorney General; Lee A. Jackson and Harold C. Wilkenfeld, Department of Justice, Washington, D.C., were with him on the brief) for Respondent.

Before HUXMAN and LEWIS, Circuit Judges, and RICE, District Judge.

HUXMAN, Circuit Judge.

This is an appeal from the decision of the Tax Court, holding first, that with respect to the income involved for the years in question petitioner was engaged in the business of buying and selling real estate in the ordinary course of business and not for investment purposes, and therefore, the income was taxable as ordinary income under Sections 117(a)(1)(A) and 117(j)(1) of the Internal Revenue Code of 1939; and second, that petitioner was not entitled to postpone recognition of the gain realized from the sale of 77 lots to the Union Pacific Railroad Company in 1952 under provisions of Section 112(f) of the 1939 Code. Based upon these conclusions, additional income taxes for the years in question were assessed.

A detailed statement of how petitioner came to be is necessary to understand the problems presented. The Riverview State Bank, a Kansas corporation,[1] is forbidden by Kansas law to hold or own real estate. The City of Kansas City, Kansas, paid for certain public improvements

1. Herein called the Bank.

by issuing and delivering to contractors tax bills which they in turn sold to purchasers to obtain money to finance their operations. These tax bills became a lien on the property which was subject to assessment for taxes. If the taxes were not paid, the property was sold for taxes. The bank purchased several hundred thousand dollars worth of these tax bills. When owners of tracts of land failed to pay the taxes levied against their property, the land was sold at tax sale and to protect its investment in these tax bills, the bank was forced to purchase the land at such sales. The state and federal bank examiners objected to these purchases of land. To divest itself of these holdings, the bank formed a wholly-owned subsidiary corporation, the General Securities Corporation, to hold these certificates and lands. The bank examiners objected to this arrangement, whereupon, considerable persons, with one exception stockholders in the bank, organized petitioner, the Real Estate Corporation, Inc.,[2] to hold these assets. The corporation purchased all the assets of the General Securities Corporation, giving its note in the amount of $23,944.02. The number of lots thus acquired was between one thousand and two thousand. For the years, 1949 through 1952, the corporation's activities in the purchase and sale of these lots were as follows:

	Purchases		Sales				Sales *Proceeds* As Percentage of Gross Receipts	Net Income *from Realty* Sales As Percentage of Total Net Income
Year	Lots	Transactions	Lots	Transactions	Sales Proceeds	Other Receipts		
1949	44	*	62**	18	$21,672.50	$ *	*	*
1950	80	9	32**	18***	22,050.00	32,252.91	40.6	82.5
1951	24	6	63**	14	18,254.88	41,570.48	30.5	61.6
1952	9	3	117	20***	57,190.98	56,038.09	50.5	84.4
1953	9	4	52	18***	17,333.33	59,944.92	22.0	31.8
1954	21	13	28**	6	20,311.85	53,793.39	27.0	33.3

*Not shown.
**Plus tracts of various sizes.
***Excludes condemnations by the city.

2. Herein called the corporation.

These were all vacant lots and were scattered generally throughout the city.

In carrying on its activities, the corporation maintained no separate offices, but used the address and place of business of the bank. It paid no salaries, no rent, no dividends and maintained no listing in any telephone directory or in the Polk City Directory. It was not licensed as a real estate broker or agent. It did no soliciting of customers by newspaper advertisement, posting hand bills or "for sale" signs erected on the lots. Purchasers usually came to the corporation after searching the tax records at the courthouse. During the years in question, the purchasers were frequently customers of the bank or adjoining landowners. When customers came to inquire about purchasing these lots, the corporation frequently made efforts to lease them but when unable to do so, sold them instead.

The corporation was formed to protect the bank's investments and to accumulate income from investments. Its ordinary income was expected to be lease rentals, the primary purpose at acquisition of a property was to hold the real estate for its investment opportunities and advantages. Some of the proceeds from sales have been reinvested in other properties purchased at tax sales. Between ten and twenty of the unimproved properties acquired at tax sales have been leased for billboards and gardens. No parcels acquired at a tax sale have been improved by petitioner. Its improved and leased parcels were separated on its books from the unimproved property purchased at tax sales. The improved properties were acquired privately and were leased. The corporation has lost some parcels by failure to pay taxes, pursuant to a policy of not paying taxes on property it felt it could not lease and on which it felt it had made a bad investment. The corporation's in-

come was expected to be, and in fact was, insufficient to pay the taxes on all of its land if all of it had been retained.

In 1952, the Union Pacific Railroad planned to expand its addition in Kansas City, Kansas. This being a public improvement, the Union Pacific had power to acquire property therefor under its power of eminent domain. It wanted some of these vacant lots owned by the corporation and before commencing condemnation proceedings, negotiated a sale of 77 lots to Union Pacific for a price of $30,878.48. Petitioner was unable to reinvest these proceeds at tax sales of unimproved lots. In 1952, approximately $27,000 of the proceeds realized from the sale of these lots to the Union Pacific was invested in stocks of the First National Bank, which stock was sold in 1955 to the corporation's president.

On December 31, 1953, the petitioner mailed a partially completed Treasury Form 1114, "Application to Establish a Replacement Fund," to the District Director of Internal Revenue, Wichita, Kansas, which was received in the office on January 4, 1954. This form requires the applicant to proceed as expeditiously as possible to restore the property condemned. The Commissioner took no action on petitioner's application.

In its original 1952 income tax return, petitioner elected to recognize the gain from the sale to the Union Pacific but thereafter on January 15, 1953, it filed an amended return based on nonrecognition of the gain and took credit thereon for its alleged overpayment of the first installment due under its original return.

Based upon these findings, the Tax Court concluded that the corporation was engaged in the business of holding real estate for investment purposes and that it was

also engaged in a second business of holding unimproved land primarily for sale to customers in the ordinary course of business.

The corporation challenges the findings of the Tax Court and the judgment based thereon on the ground that there is no substantial evidence in the record supporting its conclusions. The answer to this question must be found in the peculiar facts of this case and since the facts in no two cases are identical, decisions in other cases are not controlling, although they may throw light on our problem. Therefore, no attempt will be made to analyze and distinguish these numerous decisions.

The principles of law which control are clear and not in conflict. All decisions recognize that the capital gain provision of the Revenue Law was passed for a special group of taxpayers. It was passed to relieve a taxpayer from excessive tax burdens resulting from those situations where property had been purchased for an investment, had been held for a long period of time and had greatly appreciated in value. Congress intended to give a taxpayer relief from the tax burden which would result if he were required to report the appreciated value over a long period of time as ordinary income in the year the capital asset was liquidated. Being an exception to the general rule of taxation, the provision must be narrowly construed and one who seeks the benefits of its provision must bring himself strictly within the terms of the exception.[3] If the findings of the Tax Court find support in the record, we may not reverse because we, in the first instance, might have reached a different conclusion.

Petitioner stresses the decisions of many courts including this court,[4] emphasizing the presence or absence of

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3. *Commissioner* v. *P. G. Lake*, 356 U.S. 260.

4. See *Victory Housing No. 2* v. *Commissioner*, 205 F.2d 371; *Mauldin* v. *Commissioner*, 195 F.2d 714.

certain factors in support of their conclusions that a certain taxpayer was or was not engaged in the purchase and sale of real estate in the ordinary course of business. The most common of these factors are holding a real estate license, advertising sales campaign, telephone listings as a realtor, for sale signs placed on a property, personal solicitations, etc. The corporation stresses our decision in *Victory Housing Unit No. 2, supra,* emphasizing the absence of these factors but in that case we were careful to point out that "none of them are determinative; neither is the presence nor the absence of any of these factors controlling." It was pointed out in that case that if one holding a number of capital assets decides to liquidate them, "it could sell them in any way most advantageous to it" so long as it did not enter the real estate business. We know of no reason, in law, why one desiring to dispose of capital assets might not do so in the same way he would dispose of real estate sold in the ordinary course of business. So long as he confined his efforts to liquidating the capital assets, he would not be engaged in the ordinary real estate business no matter in what manner he sold such assets.

But the corporation's status here is not such that we must say, as a matter of fact, that it was not engaged in the purchase and sale of real estate in the ordinary course of business. At the beginning, all of the assets which resulted in a requirement that the bank divest itself of these holdings were tax certificates. ~~These were short term paper and certainly did not constitute capital assets.~~ When this real estate was purchased to protect the bank's investment in these certificates, whether such real estate thereafter became a capital asset depended upon how the bank and its successor corporation chose to treat them. Significant is the fact that the corporation in each year in question continued to buy and sell these vacant scattered lots of small

value. It kept them separated on its books from capital assets producing income. It made no effort to improve them so the real estate would produce rental income. The rental income from the investment property was insufficient to maintain the financial integrity of the corporation. Whether we consider gross or net income, a very considerable percent of the corporation's income came from the sale of these lots. ~~In no single instance did the corporation refuse to sell one of these lots to a purchaser desiring to buy.~~ Because of its relationship to and contact with the bank, it had quite a steady flow of prospective purchasers without the necessity of carrying on a sales campaign.

The corporation emphasizes the fact that it paid no salary and declared no dividends and that the officers devoted but little time to the affairs of the corporation. But the fact remains they devoted sufficient time to its affairs to locate these lots, purchase them at foreclosure sales and negotiate and complete sales thereof in considerable number in each of the years in question. We feel that the Tax Court's conclusions that the corporation was engaged in a second business of buying and selling these vacant lots in the ordinary course of business finds support in the record.

A second issue presented is whether the Tax Court erred in denying postponement of the gain of $30,878.48 realized from the involuntary conversion of the 77 lots sold by the Union Pacific in 1952. Under Section 112(f)(3) of the Code, any gain realized from an involuntary sale occurring after December 31, 1950, may be postponed at the election of the taxpayer, provided taxpayer (1) replaces the property with similar property within one year after the close of the first taxable year in which any part of the gain was realized, or (2) procures an extension of time for its replacement.

No application for extension of time was ever filed. However on December 31, 1953, a partially completed Treasury Form 1114, "Application to Establish a Replacement Fund" was mailed to the District Director of Internal Revenue, Wichita, Kansas. The application was received at the District Director's office January 4, 1954. Section 112(f)(3) of the 1939 Code, applicable to conversions occurring after December 31, 1950, has no provision for the establishment of a replacement fund. The corporation was therefore not entitled to the establishment of such a fund.

The Tax Court, however, treated the application as one for extension of time to replace the property under Section 112(f)(3) but held that so treated, the application was insufficient because not filed in time and because it did not comply with the regulations with respect to filing a qualified bond.[5] The bond filed with the application was only partially completed and did not purport to be executed by a qualified surety company as required by Regulation 118. The time for filing an application for extension of time expired December 31, 1953. The application was deposited in the mail on December 31, 1953, but was not received at the Director's office until January 4, 1954. The corporation relies upon 26 U.S.C.A., §7502, in support of its contention that the date of the postmark on the envelope shall be deemed

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5. Treasury Regulation 118-39. 112(f)—1(c)(3), provides that:

> "Such application shall be made prior to the expiration of the one year after the close of the first taxable year in which any part of the gain upon the conversion is realized. * * * No extension of time shall be granted pursuant to such an application unless the taxpayer executes a bond, with such surety as the Commissioner may require, * * *. Only surety companies holding certificates of authority from the Secretary of the Treasury as acceptable sureties on Federal bonds will be approved as sureties. * * *"

the date of delivery.[6] However, Section 7851(a)(6)(A) and (C)(v) of the Internal Revenue Code of 1954 expressly provides that with respect to the 1939 Code, Section 7502, shall apply only if the mailing occurs after the date of the enactment of this Act.[7] Thus Section 7851(a)(6)(A) and (C)(v), and the pertinent part of Regulation 118, sustains the Tax Court's finding that no proper application for extension of time to establish a replacement fund was timely filed. Since no such applicati .. was filed, the corporation was not entitled to postpone the income realized in 1952 from the sale of these 77 lots.

Affirmed.

ORDER DIRECTING STRIKING OF CERTAIN LANGUAGE OF OPINION.

Eighteenth Day, March Term, Monday, April 23rd, 1962.

Before Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges, and Honorable Eugene Rice, District Judge.

The petition for rehearing states that as a premise for the decision, the opinion of the Court states that, "These[8]

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6. 26 U.S.C.A., §7502, in part, provides that:

"This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement or other document, determined with regard to any extension granted for such filing, and only if the claim, statement, or other document was, within the prescribed time, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, office, or officer with which the claim, statement, or other document is required to be filed."

7. "(v) Chapter 77, relating to miscellaneous provisions, except that section 7502 shall apply only if the mailing occurs after the date of enactment of this title, and section 7503 shall apply only if the last date referred to therein occurs after the date of enactment of this title."

8. Referring to the tax certificates.

were short term paper and certainly did not constitute capital assets" and that this statement is erroneous as a fact and also as a conclusion of law.

This statement is not the basis of the opinion as a careful reading thereof will show and is not necessary to a decision of the case, and the Clerk is therefore directed to strike it from the opinion on file.

It is also asserted that the statement, "In no single instance did the Corporation refuse to sell any of these lots to a purchaser desiring to buy", is likewise erroneous as a fact because the record shows that in three instances involving two lots in two cases and one in another, inquiries looking to a purchase of these lots were rejected. Reference to these three isolated instances shows th statement quoted is not literally correct. But this slight error does not require a different result. A careful reading of the opinion supports this conclusion and makes the philosophy thereof clear and unmistakable and an amplification is not necessary.

The Clerk is therefore instructed to also strike the last above quoted statement from the opinion on file.

We have carefully considered the petition for rehearing and conclude that it should be denied and the Clerk is hereby directed to enter such an order.

ORDER DENYING PETITION FOR REHEARING EN BANC.

Eighteenth Day, March Term, Monday, April 23rd, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of petitioner for a rehearing *en banc* herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing *en banc* be and the same is hereby denied.

ORDER DENYING PETITIONER'S PETITION FOR REHEARING.

Eighteenth Day, March Term, Monday, April 23rd, 1962.

Before Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the petition of petitioner for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

By order of May 2, 1962, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under the provision of paragraph 3 or rule 28 of said court.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 216

REAL ESTATE CORPORATION, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question is whether the taxpayer-corporation's activities in purchasing unimproved real estate lots at tax sales and selling them constituted a "business." If so, the lots, being "held * * * primarily for sale to customers in the ordinary course of [the taxpayer's] trade or business," were not capital assets within the meaning of § 117(a) of the Internal Revenue Code of 1939 and the gain realized from their sale was taxable as ordinary income. The Tax Court

found that the lots were so held and were not capital assets, and the court of appeals affirmed.

The point at which real estate buying and selling activities cease to be "investment" and become a "business" cannot, of course, be defined by an easy formula, and the myriad of cases on the subject has produced a consensus that each case turns on its particular facts and that the trial court's decision should be affirmed unless "clearly erroneous."[1] Whether, on its particular facts, the correct result was reached in this case is not a question for this Court. The principles applied by the court of appeals are not in conflict with those followed by other courts of appeals.[2] The petition for certiorari

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[1] *E.g., Tidwell* v. *Commissioner*, 298 F. 2d 864 (C.A. 4th); *Heebner* v. *Commissioner*, 280 F. 2d 228 (C.A. 3d), certiorari denied, 364 U.S. 921; *Bauschard* v. *Commissioner*, 279 F. 2d 115 (C.A. 6th); *Kaltreider* v. *Commissioner*, 255 F. 2d 833 (C.A. 3d); *Zack* v. *Commissioner*, 245 F. 2d 235 (C.A. 6th), certiorari denied, 355 U.S. 823; *S.E.C. Corp* v. *United States*, 241 F. 2d 416 (C.A. 2d), certiorari denied, 354 U.S. 909; *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C.A. 3d); *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th); *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Victory Housing No. 2* v. *Commissioner*, 205 F. 2d 371 (C.A. 10th).

[2] To find a conflict, petitioner cites other cases holding the frequency of sales to be but one of the factors to be considered and then asserts that the courts below treated that factor alone as determinative. The answer is that the courts below did not treat that, or any other single, factor as determinative but properly took into account all of the relevant factors in arriving at the overall judgment that petitioner's activities amounted to a "business."

should be denied.

Respectfully submitted,

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AUGUST 1962.

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No. 216.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S "MEMORANDUM."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

REPLY BRIEF OF PETITIONER TO RESPONDENT'S "MEMORANDUM."

I.

PRELIMINARY STATEMENT.

Under the provisions of Rule 24, respondent had the right to file an opposing brief to petitioner's brief for certiorari disclosing any matter or ground why the cause should not be reviewed by the Court, and respondent has filed a "Memorandum". Petitioner now avails itself of the opportunity provided by Rule 24 to reply to the "Memorandum".

II.

ARGUMENT.

A.

Respondent Does Not Challenge All of the Reasons Advanced for Granting Certiorari, but Only Part of Them.

Standing unchallenged by respondent are the following reasons advanced by petitioner for granting the writ:

(a) Respondent does not challenge the statement that it is important to investors and others to know whether the liquidation of investments under the circumstances of this case deprives them of the benefit of the capital gains provisions of the Internal Revenue Code, and this question has not been decided by this Court.

(b) Respondent does not challenge the statement advanced by petitioner that the Court of Appeals applied erroneous standards for decision when measured by the standards applied by this Court, and when measured by the standards prescribed by the controlling statute.

(c) Respondent does not challenge the statement advanced by petitioner that the issue presented raises an important question of federal law which has not been decided by this Court either under the Internal Revenue Code of 1939 or the Internal Revenue Code of 1954.

B.

Refutation of Respondent's Reasons Advanced for Denial of Petition for Certiorari.

In respondent's "Memorandum" in opposition to the granting of the petition for certiorari, it is indeed significant that only three grounds are advanced by the respondent—and they are:

(a) That the trial court's decisions should be affirmed unless "clearly erroneous".

(b) That whether or not a correct result was reached in this case on its particular facts is not a question for this Court.

(c) That the principles applied by the Court of Appeals are not in conflict with those followed by other Courts of Appeals.

It is on these grounds that respondent argues the petition for certiorari should be denied. We shall demonstrate the invalidity of those grounds.

(a) The "Clearly Erroneous" Rule Does Not Apply.

The main prop on which the Government leans in opposing the granting of the writ is the first reason advanced, that findings of fact are binding unless "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure.

But here there was no conflict in the testimony or evidence and, paraphrasing the language of Mr. Justice Cardozo[1], the prop on which the Government leans is a broken reed, for this Court has ruled:

> "There is no significant dispute as to the b sic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52(a), that findings of fact shall not be set aside unless clearly erroneous".[2]

Since there was no dispute as to the facts, it necessarily and logically follows that there can be no applica-

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1. *Shepard* v. *United States*, 290 U.S. 96, 99; 78 L. Ed. 196, 199.

2. *U. S.* v. *DuPont DeNemours & Co.*, 353 U.S. 586, 598; 1 L. Ed.2d 1057, 1070.

tion of the "clearly erroneous" rule, contrary to the argument advanced by the respondent.

In an unsuccessful attempt to invoke the aid of the "clearly erroneous" rule, the respondent inaccurately asserts that:

> "The question is whether the taxpayer-corporation's activities in purchasing unimproved real estate lots at tax sales and selling them constituted a 'business'."

The respondent then dons syllogistic seven league boots to reach the unwarranted conclusion—a non sequitur—that petitioner's buying and selling activities for investment purposes became another business—and that the term "a business"—standing alone—is the equivalent of the governing statutory prerequisite for exclusion of gains from the capital gains provision. But the controlling statute prescribes a different criterion—it is

> "Property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". (26 U.S.C., 1952 ed., Sec. 117)

(b) Whether a Correct Result Was Reached Is a Question for This Court When on the Entire Evidence, a Mistake Has Been Made.

Fallacious also is the premise advanced by respondent that

> "Whether, on its particular facts the correct result was reached is not a question for this Court * * *".

To the contrary, where there is no controversy in the facts, the question then becomes one purely of law and respondent apparently ignores the decision of this Court in *United States* v. *United States Gypsum Co.*,[3] where this Court said, noting the "clearly erroneous" rule,

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3. 333 U.S. 364, 395; 92 L. Ed. 746, 766.

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."

In another tax case, contrary to its ruling here, the Tenth Circuit Court of Appeals followed that rule, as illustrated by the following quotation from *Cravens v. Commissioner of Internal Revenue*[4]:

> "Here the basic facts are not in controversy • • • A consideration of the nebulous distinctions between findings of fact and conclusions of law is not helpful. There are presented no conflicts of evidence or inference. We must take the record and determine whether a mistake has been made."

(c) The Principles Applied by the Tenth Circuit Court of Appeals Are in Conflict with Principles Applied by Other Courts of Appeals.

The third and final reason advanced by respondent for denial of the petition is that the principles applied by the Tenth Circuit Court of Appeals are not in conflict with those followed by the other courts of appeals. The conflicts were pointed out in the petition for the writ (pp. 8, 9).

But the decision of the Tenth Circuit Court of Appeals conflicts not only with the decisions of other courts of appeals on the same question, but also conflicts with its own decision in *Victory Housing No. 2* v. *Commissioner of Internal Revenue*[5]. It also conflicts with at least four of the eleven cases cited in footnote one of the respondent's "Memorandum". Those cases are summarized in the Ap-

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4. 272 F.2d 895, 898.

5. 205 F.2d 371.

pendix to this brief; and as indicated in the summary, many of them support petitioner's position.

Finally, in a futile attempt to weaken or eliminate petitioner's point that the decision sought to be reviewed is not in conflict with the decisions of other circuits, in its second footnote, the respondent advances the proposition that the courts below,

> "* * * properly took into account all of the relevant factors arriving at the overall judgment that petitioner's activities amounted to a 'business'."

The courts below *did* treat the single factor of frequency and continuity of sales as sufficient to support their decisions that petitioner's property was held primarily for sale to customers in the ordinary course of trade or business. And this is so for the perfectly obvious reason that none of the other factors was present, as noted in the Tax Court opinion, Tenth Circuit Record at pages 49 and 51; and as noted in the opinion of Court of Appeals, 301 F.2d 423, 426. (Appendix to Petition, page A-3)

In the same footnote, the respondent again attempts to pull its proposition up by its own bootstraps and again dons syllogistic seven league boots by erroneously equating the term "business" standing alone to the statutory standard of:

> "Property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business".

III.

CONCLUSION.

It is therefore very respectfully submitted again that the petition for certiorari should be granted for the following reasons in addition to those which were advanced in the petition:

(a) The respondent has conceded the importance of the question by failure to challenge that point made by petitioner.

(b) The respondent has conceded by failing to deny that the question involved has not been decided by this Court.

(c) The respondent has conceded by failing to deny that the Tenth Circuit Court of Appeals applied erroneous standards in reviewing the judgment of Tax Court.

Having now these unchallenged reasons for granting the writ, in addition to those stated in the original petition for certiorari, it is prayed that the petition be granted and the writ issued; that the judgment be reviewed; and that on review the judgment be reversed.

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The cases cited in *Footnote One* of respondent's "Memorandum" (a) are clearly distinguishable; (b) only three of them tend to support the proposition in support of which they are cited; and (c) four of them support petitioner's argument that a finding property was held primarily for sale to customers in the ordinary course of business is an ultimate finding of fact subject to review free of the restraining influence of the clearly erroneous rule. We illustrate briefly:

1. *Tidwell* v. *CIR*, 298 F.2d 864 (CA-4-1962)
   (No contention improper legal criteria applied)
   (Subdivided tracts—arranged with real estate agents to advertise and sell. Unless clearly erroneous, findings stand.) (P. 866)

2. *Heebner* v. *CIR*, 280 F.2d 228 (CA-3-1960)
   (Taxpayer had no intention to retain property as investment holding.) (P. 234)
   (Finding property held primarily for sale is in nature of an ultimate finding, a legal inference from other facts, subject to review free of the restraining influence of the clearly erroneous rule). (P. 232)

3. *Bauschard* v. *CIR*, 279 F.2d 115 (CA-6-1960)
   (Property subdivided and improved. Does not mention "clearly erroneous".)

4. *Kaltreider* v. *CIR*, 255 F.2d 833 (CA-3-1958)
   (Subdivided land—built houses on some)
   (Finding primarily for sale to customers. Ultimate finding of fact, a legal inference from other facts; and it is subject to review free of the restraining impact of the "clearly erroneous" rule.) (P. 837)

5. *Zack* v. *CIR*, 245 F.2d 235 (CA-6-1957)
   (Per curiam affirmance of 25 TC 676 on ground findings not clearly erroneous.)

6. *S. E. C. Corp.* v. *U. S.*, 241 F.2d 416 (CA-2-1957)
(Sale of used water, beer and frosted food coolers rented and ultimately sold to customers. Per curiam affirmance of 140 F. Supp. 717.)

7. *Philber Equipment Corp.* v. *CIR*, 237 F.2d 129 (CA-3-1956)
(Taxpayer leased motor vehicles principally to fleet operators. Sold when useful life ended. Tax Court held "Primarily for sale". Court of Appeals reversed. Ultimate finding of fact—legal inference subject to review free of restraining influence of "clearly erroneous" rule. (P. 131)

8. *Harry Slatkin Builders* v. *CIR*, 235 F.2d 189 (CA-6-1956)
(Per curiam—Dwelling units sold by petitioner—held primarily for sale—not investment—findings not clearly erroneous. Tax Court affirmed.)

9. *Smith* v. *Dunn*, 224 F.2d 353 (CA-5-1955)
(Architect liquidated land held by inheritance. Subdivided—employed real estate agent to handle. Court of Appeals reversed District Court holding that gain was ordinary income. No dispute in evidence. Reversed for entry of judgment for taxpayer.)
(Supports view that question of law only is presented when no dispute in evidence.)

10. *Shearer* v. *Smyth*, 221 F.2d 478 (CA-9-1955)
(Per curiam affirming 116 F. Supp. 230 on grounds stated in District Court opinion. Petitioners were real estate agents. Subdivided tract—Sales campaigns.)

11. *Victory Housing No. 2* v. *CIR*, 205 F.2d 371 (CA-10-1953)—Supports this petitioner's argument.
(Judgment of tax court against taxpayer reversed. Considerable number of sales in short time held not sufficient. As in the instant case, taxpayer continued in rental business; did not buy or develop real estate for sale; held no real estate license; did not advertise; and did not list property with real estate men.) (P. 373)

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 216

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 216

REAL ESTATE CORPORATION, INC.,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

I.

PRELIMINARY STATEMENT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner in the above-entitled cause presents this its petition for a rehearing of the order of October 8, 1962, denying certiorari.

In support of the petition for rehearing petitioner files the following brief, respectfully directing attention to ju-

dicial and text expositions of conflict between the circuits, not previously presented.

II.

ARGUMENT

A. Circuit Judge Wisdom's Statement of Conflict Between Circuits.

Counsel for petitioner did not point out with sufficient clarity one of the basic grounds urged for granting the writ of certiorari—the conflict of decisions between the Courts of Appeal on the interpretation of the statute[1] excluding from the benefit of capital gains "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". The point was made in the original petition for certiorari at pages 8 and 9.

Petitioner now respectfully desires to direct the attention of the Court to the following statement of the conflict between the Ninth Circuit and the Fifth Circuit found in the dissenting opinion of Circuit Judge Wisdom in *Cole* v. *Usry*:

> "This is not unusual in tax refund cases, but when such law-finding requires the jury to understand and apply *a section of the Internal Revenue Code so uncertain that it means one thing in the Ninth Circuit and another thing in the Fifth Circuit* * * *" (Emphasis ours).

In concluding his dissent, Judge Wisdom again emphasizes that interpretation of the statute is a doubtful and unsettled legal question, in these words:

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1. 26 USC, 1952 Ed., Sec. 117, pp. 3372, 3374.

2. 294 F.2d 426, 430, 432.

> "In my humble judgment, the only thing clearly irrational about this case is that the law compels a jury of laymen to function as a court in deciding a doubtful, *unsettled, legal question* that would be a toss-up if it were submitted to a court composed of tax experts." (Emphasis ours).

This is a clear and convincing exposition of the conflict between the circuits by an eminent jurist—and a more forceful one has not been found. But there are other expositions of the conflict and inconsistency between the circuits from the leading text on the subject of Federal taxation and they follow in the next section of this brief.

B. Extracts from Mertens Law of Federal Income Taxation and from Leading Article in Yale Law Journal Emphasizing Inconsistency of Results in Interpreting the Statute.

The inconsistency resulting from interpretation of the cited statute evokes the following comment by Mertens:[3]

> "But the legislative approach has not been the product of a clear or consistent underlying policy or theoretical base, and the practice itself, marred by special-interest distortions, *likewise has reflected indecision and inconsistency.*" (Emphasis ours)

With further reference to the difficulty experienced by the Courts in the interpretation of the statute, the following statement is made in Mertens:[4]

> "The term 'capital assets' does not include property 'held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.' These words have given rise to as much litigation as any other in the entire Code."

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3. Mertens Law of Federal Income Taxation, Vol. 3B, p. 5.
4. Mertens Law of Federal Income Taxation, Vol. 3B, p. 74.

Again pointing out the inconsistent results of interpretation of the various factors to be considered in solving problems presented under the statute, this comment is made in Mertens:[5]

> "While the attention which has been given to these factors requires that they be given careful consideration, it is well to remember that they have neither precise nor determinative weight, *and that inconsistent results have followed in their presence.*" (Emphasis ours)

Quoting from the Yale Law Journal,[6] Mertens then reinforces the statement of inconsistency:

> "For each of the supposedly fundamental principles enunciated by the courts in attempting to apply this clause, a contrary quotation can usually be found which vitiates its force. *This tends to prevent the development of a corpus of consistent doctrine available for the resolution of new problems as they arise.*" (Emphasis ours).

III.

CONCLUSION

As pointed out by Circuit Judge Wisdom in *Cole* v. *Usry*,[7] the section of the Internal Revenue Code under review means one thing in the Ninth Circuit and another thing in the Fifth Circuit—and it now means yet another thing in the Tenth Circuit, if that Court's decision is permitted to stand.

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5. Mertens Law of Federal Income Taxation, Vol. 3B, p. 623.

6. Miller, The Capital Asset Concept: a Critique of Capital Gains Taxation: I 59 Yale Law Journal 837, 877 (1950).

7. 294 F.2d 426, 430, 432.

The conflict between the circuits and the inconsistency of their decisions has been demonstrated by the quotation from the opinion of Circuit Judge Wisdom; by the quotations from Mertens; and by the extract from a leading article in the Yale Law Journal.

It is therefore again very respectfully prayed that the order denying the petition for certiorari be vacated; that certiorari be granted; and that the questions and conflicts presented be resolved.

Dated October 30, 1962.

Respectfully submitted,

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Counsel for Petitioner.

CERTIFICATE

It is hereby certified that the foregoing Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari in this proceeding is presented in good faith and not for delay; and the petition is restricted to one of the grounds specified in paragraph 2 of Rule 58.

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